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C O N F I D E N T I A L BERLIN 003296

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DEPT FOR EUR/AGS AND L/LEI (KPROPP)  
DOJ FOR THE OFFICE OF THE ATTORNEY GENERAL (BSWARTZ)

E.O. 12958: DECL: 11/14/2016  
TAGS: [KJUS](#) [KMDR](#) [PREL](#) [GM](#)  
SUBJECT: NGO FILES ANOTHER LEGAL COMPLAINT AGAINST SENIOR  
U.S. OFFICIALS

REF: 05 BERLIN 2311 AND PREVIOUS

Classified By: Deputy Chief of Mission John M. Koenig for Reasons 1.4 (b) and (d)

¶1. (C) Summary. The Justice Ministry confirmed that a German lawyer for the Center for Constitutional Rights (CCR), a New York-based NGO, filed a 380 page legal complaint via email November 14 with the German Federal Prosecutor General in Karlsruhe. The complaint requests the Federal Prosecutor indict Defense Secretary Rumsfeld, Attorney General Gonzales, former DCI Tenet, and other senior U.S. officials for alleged "war crimes" at Abu Ghraib and Guantanamo. The action by the CCR, the International Federation for Human Rights (FIDH) and the Republican Attorney's Association is, according to the CCR release, being brought on behalf of 11 Iraqis reportedly mistreated in Abu Ghraib prison and a Saudi detained in Guantanamo. The Ministry of Justice official said the length of the document, plus the additional materials a German attorney filed in support of the complaint, mean that it will take the Prosecutor General's office considerable time to review it and that the Prosecutor is not likely to be able to comment publicly on it for at least four weeks. As reported in reftels, CCR has previously filed complaints with the German Federal Prosecutor, who dismissed all of them. Emboffs have spoken with Chancellery and Foreign Ministry officials as well to alert them to the issue and to express our concerns. End Summary.

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PROSECUTOR TO REVIEW CCR COMPLAINT  
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¶2. (C) Edgar Radziwill, Ministry of Justice Office Director for Law Relating to Crimes against the State, Law of Immunity, and Military Commission Law, confirmed to Emboff November 14 that the Federal Prosecutor in Karlsruhe received a 380-page legal complaint from CCR via email through CCR's German attorney Wolfgang Kaleck. Radziwill said CCR informed the Federal Prosecutor that CCR was sending via regular mail a printed version of the legal complaint along with additional supporting documents. Radziwill added Kaleck had been involved in CCR's previous efforts to seek indictments of senior U.S. military and government officials. Radziwill

said the Federal Prosecutor would have no public reaction to the CCR filing for at least four weeks. He stated that numerous factors account for the length of time the Federal Prosecutor will require, including the number of pages CCR submitted, the wait before the arrival of the supporting documents, and the fact that some of the documents are in English and will need to be translated. Commenting on the issues CCR raises in its documents, Radziwill said the allegations over possible actions in Abu Ghraib were not new and that the Federal Prosecutor had already thoroughly reviewed them in connection with the previous (and failed) initial motions. Radziwill indicated it appeared CCR also had made allegations regarding Guantanamo, but it was unclear whether they were new.

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CCR CLAIMS NEW INFORMATION, NEW CIRCUMSTANCES IN NEW COMPLAINT  
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¶3. (SBU) According to the CCR's website, they will argue several new developments merit the German Federal Prosecutor's reconsideration of their request for an indictment, notwithstanding the Federal Prosecutor's previous rejection of CCR petitions (rejections which German courts subsequently agreed were appropriate use of the Prosecutors' discretion whether or not to proceed with an investigation and indictment). The CCR claims the Military Commissions Act of 2006 grants immunity to U.S. officials, thereby undercutting the German Federal Prosecutor's previous statement that the U.S. justice system was conducting investigations. The CCR also claims they have new defendants, new evidence -- including the testimony of former U.S. Brigadier General Janis Karpinski -- and that Secretary Rumsfeld's resignation announcement lifts his sovereign

immunity.

¶4. (U) The CCR lists the following as "defendants in the case"

- Donald Rumsfeld, Secretary of Defense
- George Tenet, Former CIA Director
- Dr. Stephen Cambone, Undersecretary of Defense for Intelligence
- Lieutenant General Ricardo Sanchez
- Major General Walter Wojdakowski
- Major General Geoffrey Miller
- Colonel Thomas Pappas
- Alberto R. Gonzales, Attorney General and Former Chief White House Counsel
- General Jay Bybee, Former Assistant Attorney
- John Yoo, Former Deputy Assistant Attorney General
- William James Haynes, II, General Counsel of the Department of Defense
- David S. Addington, Vice President Chief Counsel

¶5. (C) The DCM spoke with the Chancellery's North America Director, Geza von Geyr, to express concern over the proceedings. EMIN also contacted the MFA's North America Director to express concern. The MFA Director said he had already been in contact with the MFA's legal department and that they were aware of the issue. The initial MFA sense was that, while "anyone can file," the U.S. has full rule of law and an advanced legal system. The public prosecutor, he continued, would likely find the group could file a complaint and receive justice in the U.S and there is no need to file in Germany. His informal sense was that the NGO, which has connections to the U.S., was "court-shopping" in coming to Germany. We noted, however, that while there was a body of precedent, that did not guarantee that the judiciary would proceed the same way this time and so we continued to see reasons for concern.

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BACKGROUND  
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¶6. (SBU) The German Federal Code of Crimes against International Criminal Law (CCAIL), enacted on June 30, 2002

is the German domestic legislation implementing the Rome Statute establishing the International Criminal Court. The CCAIL codifies genocide, crimes against humanity, and war crimes in domestic German criminal law. It also permits prosecutions in Germany for these crimes regardless of the nationality of the accused and/or the place of the alleged crime. German courts have invoked -- rarely -- the concept of universality for crimes such as genocide, trafficking in persons, drug trafficking, and forgery. The CCAIL expands the category of offenses with no connection to Germany that may be prosecuted in Germany. The Federal Prosecutor leads investigations and decides whether or not to indict in cases of alleged crimes under the CCAIL. Individuals or groups can send legal complaints to the Federal Prosecutor to seek an indictment. These complaints can trigger a preliminary investigation. The "legality principle" requires the Federal Prosecutor to conduct an objective investigation to fully develop facts and evidence and to determine if sufficient evidence exists to indict. The Federal Prosecutor has some discretion in making a decision:

- The CCAIL allows the Prosecutor to decline to prosecute a non-German national for an offense if the crime was committed in a foreign country and if the accused is not residing, nor expected to reside, in Germany. This measure is designed to limit the broad universal jurisdiction of the CCAIL.

- The Federal Prosecutor can use discretion not to indict in cases that affect German "national interests."

- The Federal Prosecutor, even if initially agreeing to pursue the complaint, may decide to drop the complaint for lack of evidence.

- The Federal Prosecutor may decide not to indict if the accused is currently being tried by an international court, by the state in which the offense was committed, or by the state of citizenship of the accused, or if the transfer of the case to an international court or extradition to the prosecuting state is permissible and is intended.

17. (SBU) The Federal Prosecutor formally is part of the executive branch and under the general oversight of the Federal Justice Minister. In reality, the Minister does not direct the activities of the Federal Prosecutor and the German public regards the Prosecutor as independent. Also, even if the Federal Prosecutor chooses not to indict, complainants can challenge the Federal Prosecutor's decision in court.

18. (SBU) Individuals and groups in past years have filed numerous complaints under the CCAIL with the Federal Prosecutor seeking the indictment of prominent U.S. and German officials, including President Bush and former Chancellor Schroeder and members of their cabinets. Recent complaints against U.S. officials centered around the war in Iraq; complainants also alleged German officials "aided and abetted" U.S. actions. The Federal Prosecutor has dismissed all these complaints. Complainants have gone to court to force the Federal Prosecutor to open an indictment, but in all cases German courts have upheld the Federal Prosecutor's decision not to indict.

19. (SBU) Mission will remain focused on the proceedings and report any developments. The Ambassador is scheduled to meet Justice Minister Zypries November 17 and the DCM will meet Justice Ministry State Secretary Diwell November 22. We intend to raise the legal complaint and ask how the German Government will handle the situation.

TIMKEN JR